Citations to Opinion Below

The per curiam opinion of the Supreme Court of New Jersey, printed in Appendix B hereof, is reported in 46 N.J. 254, 216 A.2d 372.

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on January 24, 1966. A copy thereof is printed in Appendix C hereto, infra. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) since petitioner's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States are drawn in question.

Questions Presented

1. Whether petitioner, by appearing pro se at his trial and actively conducting his own defense, waived his privilege to be free of adverse comment by the court and prosecutor, during the trial, summation and charge, concerning his failure to testify in his own behalf?

2. Whether petitioner could be convicted with the aid of documentary evidence taken by an unreasonable search and seizure in the form of a subpoena duces tecum under which all of petitioner's records, both business and personal, were seized and carried away by those serving the subpoenas, without notice to petitioner?

3. Whether petitioner was forced to incriminate himself due to the disallowance of his claim of immunity based on the compulsory production of his books and records by subpoena under the New

Jersey Uniform Securities Law, where petitioner did not claim his immunity due to the seizure of the records in his absence and without his knowledge?

Statutes Involved

The statutory and constitutional provisions involved are New Jersey Statutes Annotated 2A:102-3, 2A:111-1, 2A:111-9, 2A:111-10, 2A:111-11, 49:3-5, 49:3-18, 49:3-16(d), and the Fourth, Fifth and Fourteenth Amendments to the United States Constitution, all of which are printed in Appendix A, infra.

Statement

Twelve indictments, containing a total of 74 counts, were returned by an Essex County Grand Jury charging petitioner with violating the New Jersey Securities Law and with the crimes of obtaining money by false pretenses, conversion of money by a corporate officer, keeping of fraudulent accounts by a partner, circulation of false written statements by a partner, omission of material particulars in books of account by a partner, and the making of false entries by an officer in corporate books of account.

Petitioner's trial before a jury commenced on May 13, 1964 and lasted until June 16, 1964 when the jury returned a verdict of guilty on 67 of the 74 counts (4 counts having been dismissed at the trial). Petitioner was not represented by counsel at the trial, appearing pro se throughout the proceedings.

On May 20, 1964, during the course of the trial, petitioner moved to suppress all of the prosecution's

documentary evidence on the ground that it was obtained by virtue of an unreasonable search and seizure. The trial court halted the trial and conducted a hearing out of the presence of the jury. The hearing also considered whether petitioner was immune from prosecution by virtue of N.J.S. 49:3-16(d). The hearing revealed the following facts (51a-144a):*

On June 27, 1963, approximately one month after the defendant no longer occupied any official status in the business enterprises out of which this prosecution arose, three subpoenas issued out of the new Jersey Bureau of Securities under which all of petitioner's books and records, both business and personal, were seized (1a-6a). One subpoena was directed to he First Jersey Servicing Co., a company wholly owned by petitioner, for the production of all books, records, papers and documents. The second subpoena was directed to Sherman Hirschfeld for the production of all personal records of petitioner and First Jersey Servicing Co., including the records of any participating certificates sold by petitioner, bookkeeping records and financial statements of petitioner's activities, San-Mac Associates, and Wiss Building Associates, the latter being limited partnerships in which petitioner was the sole general partner. A third subpoena was to petitioner himself, apparently for personal appearance. The first two subpoenas were served upon Hirschfeld at his office which was also petitioner's private office and that of various corporate activities. They directed the production of the subpoenaed

*"a" refers to the appellants appendix in the Supreme Court of New Jersey, which appendix has been certified and filed with this petition as a part of the official record below.

material "forthwith" and, pursuant thereto, those serving the subpoenas removed the many items immediately to the Bureau of Securities. The petitioner was never notified of the service of the subpoenas and no inventory of the documents taken was ever left or transmitted to the petitioner. During the hearing the prosecutor admitted that documents used in the trial were received from the Bureau of Securities (Supplementary Appendix C). A press release by the Essex County Prosecutor was read into evidence in which the Prosecutor admitted that the criminal investigation was a cooperative effort between the Essex County Prosecutor's office and the Bureau of Securities.

After hearing the tesimony of Charles Moutenot, an investigator assigned to the Bureau of Securities, the trial court found, as a matter of fact, that the investigation by the Bureau of Securities led directly to the filing of the criminal complaint against the petitioner on July 12, 1963. The trial court denied the motion based upon immunity on the ground that petitioner had not claimed his privilege as required by N.J.S.A. 49:3-16(d) when he appeared in response to the subpoena on July 3, 1963. At that time petitioner was asked some questions and then advised by his attorney to testify no further. The court, by implication, also denied petitioner's motion based on illegal search and seizure, though no reasons were given. The court merely indicated that since no search warrant was required by the statute, there was no search and seizure.

All of the documentary evidence obtained as outlined above was introduced throughout petitioner's trial.

During the course of the trial the court of its own volition made five separate and distinct lengthy and pointed comments concerning the availability and seeming necessity for petitioner to testify (146a-152a). Having heard the court indulge in these comments the prosecutor then began to do the same. The prosecutor commented twelve times during the trial concerning petitioner's availability to testify and coaxing him to testify (153a-165a). During summation, the prosecutor commented in powerful language twelve times on the failure of the defendant to testify and followed through with the demand that the jury should thereby infer guilt from his silence and failure to take the stand to rebut or explain the testimony offered against him (189a-90a; 190a-91a; 195a; 216a; 221a; 222a; 224a; 229a; 236a; 238a; 240a; 242a).

The defendant made a specific request that no mention be made in the charge of his failure to testify (304a). Nevertheless, the court charged what was thought to be the prevailing law in New Jersey at that time, that petitioner's failure to testify raised a permissible inference that he could not truthfully deny facts in evidence (279a-280a).

The jury began to deliberate on Monday, June 15, 1964 at 5:05 p.m. They adjourned at 11:00 p.m. that evening and reconvened at 9:30 a.m. on Tuesday, June 16, 1964. At 11:00 a.m. the prosecutor requested the trial court to direct the jury to discontinue their deliberations and to withdraw that portion of the charge dealing with defendant's failure to testify. The trial court recalled the jury at 11:17 a.m. The basis for the prosecutor's request was a report in the New York Times of

the opinion of the United States Supreme Court in Malloy v. Hogan, decided June 15, 1964. The prosecutor submitted a proposed charge based on the newspaper account. Defendant moved for a mistrial and the motion was denied. At 1:55 p.m. the trial court, over defendant's demand for a mistrial, recharged the jury in accordance with the prosecution's request, withdrawing its earlier charge and stating that petitioner's failure to take the stand should not weigh against him (317a-27a).

At 1:58 p.m. the jury returned to their deliberations and at 5 p.m. returned a verdict of guilty (327a-29a).

On his conviction petitioner was sentenced to various consecutive, suspended, and concurrent sentences which resulted, in the aggregate, in a term of 10-20 years in prison. Petitioner appealed to the Appellate Division of the Superior Court of New Jersey but his appeal was certified to the Supreme Court of New Jersey, before argument in the Appellate Division. On January 24, 1966 the Supreme Court of New Jersey affirmed petitioner's conviction.

How Federal Questions are Presented

Early in the trial, petitioner moved for the suppression of all documentary evidence taken under subpoena by the New Jersey Bureau of Securities as being in violation of petitioner's rights under the Fourth Amendment to the United States Constitution. (The trial court denied petitioner's motion.) Petitioner also claimed immunity from prosecution under the provisions of

the New Jersey Securities Law (51a-144a). The trial court similarly denied any relief upon this application. On appeal to the New Jersey Supreme Court petitioner again urged these contentions and also raised the question of a violation of his rights under the Fifth Amendment to the United States Constitution by virtue of adverse comment by the court and the prosecutor upon his failure to testify in his own defense. The Supreme Court of New Jersey passed upon all of these questions in its opinion (Appendix B, infra). Federal questions are, therefore, properly presented by virtue of petitioner's claim of contravention of his rights under the Fourth and Fifth Amendments to the United States Constitution as made applicable to the states by the Fourteenth Amendment to the United States Constitution, specifically as set forth hereinabove.

Reasons for Granting the Writ

1. A serious question has arisen among the federal and state courts concerning the interpretation of the Fifth Amendment to the United States Constitution. This Court should resolve a conflict which now exists among the federal circuits, and which New Jersey has now joined, concerning whether a defendant appearing pro se at his trial may somehow "waive", by his actions in conducting his own defense, his right to be free of comment on his failure to testify. In Griffin v. California, 380 U.S. 609 (1965) this Court stated that

> "the Fifth Amendment, in its direct application to the federal government and in its bearing on the States by reason of the Fourteenth Amendment, forbids either com-

> ment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."

This had previously been the rule in the federal courts. See Wilson v. United States, 149 U.S. 60 (1893). It must now be determined whether, as stated in Griffin, all comment is forbidden or whether this Court's command may be diluted.

The Fifth and Ninth Circuits have held that a pro se defendant's conduct may invite comment by the court or prosecutor on his failure to testify. Redfield v. United States, 197 F.Supp. 559 (D.C. Nev. 1961), aff'd per curiam, 295 F.2d 249 (9th Cir. 1961), cert. denied, 369 U.S. 803 (1962), reh. denied, 369 U.S. 863 (1962), habeas corpus denied, 315 F.2d 76, 80 (9th Cir. 1963). Smith v. United States, 234 F.2d 385 (5th Cir. 1956). A contrary view was expressed by the Second Circuit, in United States v. Curtiss, 330 F.2d 278, 281 (2d Cir. 1964). In that case the court stated:

> "Appellant's summation as his own attorney did not constitute a waiver of his Fifth Amendment protection."

The New Jersey Supreme Court noted this conflict among the federal circuits and aligned itself with the position taken in the Redfield and Smith opinions. With reference to petitioner's "unsworn factual assertions" while questioning witnesses and during summation the New Jersey Court stated:

> "Such conduct has been held to warrant comment, in the nature of a fair response,

which calls attention to a defendant's failure to take the stand."

In none of the federal cases did there exist both comment by the court and prosecutor during the trial and summation and a charge of the court. The trial court herein charged in accordance with then-existing New Jersey practice, as set forth in State v. Corby, 28 N.J. 106, 145 A.2d 289 (1958). In Griffin v. California, supra, this court noted that new Jersey was one of only six states permitting such comment at the time.

It appears crystal clear that the New Jersey Supreme Court "closed its eyes" to all the unconstitutional comments made by the Court respecting the defendant's availability and necessity to testify, which comments by the Court initiated a course of conduct by the prosecutor who developed this theme on 24 additional occasions, 12 during the trial and 12 during summation. The New Jersey Supreme Court also, to sustain its conclusion, "brushed under the rug" the Court's erroneous charge based on State v. Corby, supra. The New Jersey Supreme Court also failed to consider that the jury had actually deliberated for 7 1/2 hours over a period of 19 hours with the erroneous charge imbedded in their minds. Did the New Jersey Supreme Court avoid these facts because the defendant appeared "pro se" or was it because the New Jersey Supreme Court is arbitrary and unwilling to adhere to the constitutional command of the Griffin decision? The New Jersey Supreme Court has circumvented the Griffin decision by avoiding the facts of this case and by refusing to accept the constitutional command of that case.

It is important to the administration of criminal

justice in both the state and federal courts that this court resolve the conflict noted above and determine whether, and under what circumstances, a criminal defendant, especially one who serves as his own attorney, may be deemed to have waived the protection accorded him by the Fifth Amendment to be free of adverse comment on his failure to testify.

2. The New Jersey Supreme Court ruled that there was no search or seizure involved in this case since the records, whose admissibility was challenged by petitioner, were obtained under a subpoena duces tecum. By so holding the court completely turned its back on a long line of cases in this Court holding that the compulsory production of books and records, by either an individual or a corporation, may constitute an unreasonable search and seizure under the Fourth Amendment. Boyd v. United States, 116 U.S. 616 (1885); Hale v. Henkel, 201 U.S. 73 (1905); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1945); United States v. Wallace and Tiernan Co., 336 U.S. 793 (1948). It has been recognized by this Court that:

> "... the subpoena is equivalent to a search and seizure and to be constitutional it must be a reasonable exercise of the power." Lasson Development of the Fourth Amendment to the United States Constitution, 137 cited in Oklahoma Press Publishing Co. v. Walling, supra, at 202.

The broad nature of the subpoenas involved in this case and the circumstances of their service should have made this problem readily apparent to the New Jersey courts. Nevertheless, they completely

ignored the issue, passing it off with one sentence in their opinion. Such a substantial departure from settled constitution doctrine should be the subject of inquiry by this Court. With the growing use of the subpoena power it is important that State courts clearly comprehend the relationship of this process to the Fourth and Fifth Amendments.

3. Petitioner's claim of immunity under the New Jersey Uniform Securities Law, N.J.S.A. 49:3-16(d), was denied due to his failure to claim his Fifth Amendment privilege. Since petitioner's records were seized in his absence and without his knowledge it is quite apparent that he was never in a proper position to claim his privilege. This court has noted, with respect to the Fifth Amendment, that

> "This constitutional protection must not be interpreted in a hostile or niggardly fashion." Ullman v. United States, 350 U.S. 422 (1956).

By its interpretation of this immunity provision the New Jersey Supreme Court negated petitioner's right to be tried without the use of self-incriminating records elicited by the compulsion of a subpoena. This decision attempts to place a narrow construction upon a privilege which this court is determined to widen. See Murphy v. Waterfront Commission of New York, 378 U.S. 52 (1964). Furthermore, this provision is essential to enforcement of the Uniform Securities Law and its scope should be clearly delineated by this court so as to avoid conflict with the Fifth Amendment.

Conclusion

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

s/ Michael A. Querques
Attorney for Petitioner

Date:

Appendix A

Appendix A Statutory and Constitutional Provisions Involved

New Jersey Statutes

2A:102-3. Conversion of property of corporation by director or officer

Any director, member or officer of any corporation or association who fraudulently takes, misapplies or misuses any money or property of the corporation or association, is guilty of a misdemeanor.

2A:111-1. Obtaining money, property, etc., by false pretense

Any person who, knowingly or designedly, with intent to cheat or defraud any other person, obtains any money, property, security, gain, benefit, advantage or other thing of value by means of false promises, statements, representations, tokens, writings or pretenses, is guilty of a misdemeanor.

2A:111-9. Destruction of books of corporation, partnership or association, or making false entries therein

Any director, officer, manager, employee, agent or member of a corporation, partnership or association who, with intent to defraud, destroys, alters, mutilates or falsifies any book, paper, writing or valuable security belonging to it, or makes or concurs in the making of any false entry, or omits or concurs in omitting any material particular in any book

of accounts or other document belonging thereto, is guilty of a misdemeanor.

2A:111-10. Keeping fraudulent accounts by directors, officers, etc., of corporation, partnership or association

Any director, officer, manager, employee, agent or member of a corporation, partnership or association who, as such, receives or possesses himself of any property thereof, otherwise than in payment of a just debt or demand, and, with intent to defraud, omits to make or to cause or direct to be made a full and true entry thereof in the books and accounts of the accounts of the corporation, partnership or association, is guilty of a misdemeanor.

2A:111-11. Making or circulating false statements by officers, etc., of corporation, partnership or association

Any director, officer, manager, employee, agent or member of a corporation, partnership or association who makes, circulates or publishes, or concurs in making, circulating or publishing any written statement or account which he knows to be false in any material particular, with intent to deceive or defraud any member, shareholder or creditor of the corporation, partnership or association, or with intent to induce any person to become a member therein, or to intrust or advance any property thereto, or to enter into any security for the benefit thereof, is guilty of a misdemeanor.

Appendix A Statutory and Constitutional Provisions Involved

49:3-5. Sales and purchases

It shall be unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly

(a) to employ any device, scheme, or artifice to defraud;

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. L.1960, c. 75, p. 527, § 5.

49:3-16. Sale of Securities

(d) No person is excused from attending and testifying or from producing any document or record before the bureau, or in obedience to the subpoena of the bureau chief or any officer designated by him, or in any proceeding instituted by the bureau, on the ground that the testimony or evidence (documentary or otherwise) required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after claiming his privilege against self-incrimination, to testify or produce evidence (documentary or otherwise), except that the individual testifying

is not exempt from prosecution and punishment for perjury, false swearing or contempt committed in testifying.

49:3–18. Criminal penalties

Any person who willfully violates any provision of this law, except section 7, or who willfully violates any rule or order under this law, or who willfully violates section 7 knowing the statement made to be false or misleading in any material respect, shall be guilty of a misdemeanor and fined not more than $5,000.00 or imprisoned not more than 3 years, or both, but no person may be imprisoned for the violation of any rule or order if he proves that he had no knowledge of the rule or order. No indictment or information may be returned under this law more than 5 years after the alleged violation. L.1960, c. 75, p. 545, § 18.

United States Constitution

AMENDMENT [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Appendix A Statutory and Constitutional Provisions Involved

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix B

Opinion of the Supreme Court

Argued November 23, 1965 -- Decided

Mr. Michael A. Querques argued the cause for appellant (Mr. Frank P. Villanova, of counsel and on the brief; Messrs. Querques & Isles, attorneys).

Mr. Brendan T. Byrne, Essex County Prosecutor, argued the cause for respondent (Mr. Barry H. Evenchick, Assistant County Prosecutor, of counsel and on the brief).

The opinion of the Court was delivered

PER CURIAM.

Defendant was tried on 12 indictments containing a total of 74 counts, involving sundry charges arising out of substantial swindles. Four counts were dismissed at trial. The jury convicted defendant on 67 of the remaining 70 counts. The sentences imposed aggregated 10 to 20 years in State Prison. We certified defendant's appeal before argument in the Appellate Division.

I.

The first issue relates to comments upon defendant's failure to take the stand.

The trial started on May 13, 1964. The jury

was charged by the trial court on June 15. It was on that day that Malloy v. Hogan, 378 U.S. 1, 12 L. ed. 2d 653 (1964), was handed down. Defendant not having taken the stand, the trial court commented upon that failure in accordance with the then settled view in our State, saying that defendant's failure to testify did not raise a presumption of guilt and that the presumption of innocence nonetheless obtained, but that the jury may infer defendant could not truthfully deny those incriminating facts in the testimony which he could meet by his own oath.

Upon learning the content of Malloy the prosecutor, apprehending that that decision might lead to a disapproval in constitutional terms of the instruction here given, asked the trial court to recall the jury and to instruct it to draw no inference whatever from defendant's failure to testify. The trial judge acceded to the prosecutor's request, charging the jury in part as follows:

> "This portion of the charge that I have just referred to shall be disregarded in every respect, and not be applied by you as the law in this case. You will consider it as not charged and likewise I instruct you that any and all comments made by the Prosecutor either during the course of the trial or in argument, or in summation in regard to the failure of the defendant to testify, are also stricken and must be disregarded, and I give you the following charge which shall govern your deliberations:
>
> 'This defendant as are all defendants in

criminal cases is presumed to be innocent, and this presumption of innocence stays with the defendant throughout the trial, and until you, the members of the jury, reach a verdict. The failure of the defendant to take the witness stand and testify in his own behalf does not create any presumption against him, and you are charged that you must not permit the fact that he failed to take the stand to weigh in the slightest degree against the defendant, nor shall this fact enter into the discussions or deliberations of the jury in any manner.'"

After the trial of the within case we held that Malloy v. Hogan and Griffin v. California, U.S. , 14 L. ed. 2d 106 (1965), must be read to proscribe the instruction as initially given the jury in this matter notwithstanding that the instruction did not treat silence as evidence of guilt and limited its impact to the evaluation of evidence actually in the case, and indeed to direct evidence which a defendant could dispute on his own oath. We have held, too, that upon a direct appeal (compare Tehan v. Shott, 34 U.S.L. Week, 4095, fn. 3 [U.S. Jan. 19, 1966]) a defendant will be accorded the benefit of the new rule but on the basis of the case as tried and not upon a speculation as to how a defendant might have gone about his defense had he anticipated Malloy and Griffin. See State v. Fioravanti, 46 N.J. 109 (1965); State v. Davis, 45 N.J. 195 (1965); State v. Aviles, 45 N.J. 152 (1965); State v. Lanzo, 44 N.J. 560 (1965); State v. Garvin, 44 N.J. 268 (1965).

The trial was lengthy, as we have already noted. The jury received the case for deliberation at 5:05

p.m. on June 15. The deliberations were recessed at 11:00 p.m. Presumably the jurors took some time to eat. They reconvened at 9:30 a.m. on June 16. At 11:02 a.m. the prosecutor requested the court to recharge the jury. At 11:20 a.m. the jury was instructed to suspend deliberations. The jury resumed deliberations at 1:58 p.m., after receiving further instructions quoted above. The verdicts were returned at 5:00 p.m., and as we have already noted the jury acquitted defendant on three of the charges.

We are satisfied that upon the total circumstances of this case there is no reasonable basis for reversal, and we so conclude upon the following factors.

(1) Defendant, an informed, articulate, and intelligent man, who had been represented before trial by counsel of his own selection, chose to try the case himself. We gather that he consulted with his own counsel during the trial, and defendant's performance reveals some tutoring in legal concepts and terminology. Nonetheless, defendant himself made his failure to take the stand a conspicuous fact that nothing could conceal. In cross-examining State's witnesses, he persisted in particularized statements of factual claims, which, but for a question mark tagged at the end, were simply his unsworn claims. Indeed defendant made specific assertions of fact without even the pretense that they were intended as questions. The prosecutor understandably responded to defendant's improper actions, and in the course of his response referred to defendant's right to take the stand. In dealing with the

State's objections and motions, the trial court necessarily instructed the jury that unsworn assertions of fact must be disregarded. See Smith v. United States, 234 F.2d 385, 388 (5 Cir. 1956). Thus the jury's attention was inevitably focused on defendant's right and failure to testify, and this because of defendant's decision to try the case and to try it his way. Indeed defendant's behavior led to something capable of greater impact than a mere comment to the effect that he did not take the stand, since the jury knew from defendant's statements that there was something he could say and tried to say but which the jury had to ignore for want of a verifying oath.

(2) Defendant was repeatedly warned with respect to unsworn factual assertions. Nonetheless he persisted, and the conviction seems inescapable that he did so in a calculated attempt to gain an advantage he could not have achieved through the services of a member of the bar. Such conduct has been held to warrant comment, in the nature of a fair response, which calls attention to a defendant's failure to take the stand. Redfield v. United States, 315 F.2d 76 (9 Cir. 1963); Smith v. United States, supra, 234 F.2d 385; but cf. United States v. Curtiss, 330 F.2d 278 (2 Cir. 1964).

(3) Despite the warnings mentioned above, defendant said in his summation:

> " * * * Have I taken the stand? I could have done nothing but say the facts are true the intent is gone and there is no intent.

What else could I say? What else could I explain?

> "I don't deny the checks were drawn to me, but they were proper. I don't deny I got seventy-six units of Wiss, but they were proper. I don't deny there were short-sales, or over-allocations in connection with the operation of the creation of the real estate syndication business, but in due course they were properly covered with the full knowledge of our accountants and of our Board of Directors, of our attorneys, and they participated in it, and if it was wrong they would never have participated. * * * *

In passing we note that the reason given for not testifying does not square with defendant's earlier statement at side bar that he hesitated to testify only because of a prior conviction of crime. At any rate, in his final attempt to communicate with the jury, defendant acknowledged the truth of the very facts to which the court's comment applied. Thus while the comment would permit the jury to infer that defendant could not deny certain facts in the testimony, defendant himself told the jury those facts were true. The sole matter with which he took issue was the intent with which he did the sundry things proved against him. He does not suggest there was any direct testimony relating to intent, and hence the court's comment did not reach that subject. We note that in United States v. Feinberg, 140 F.2d 592, 595 (2 Cir. 1944), a statement by defense counsel as to what his client would have said on the stand was held to justify comment by the prosecutor

upon the failure to testify. In any event, since defendant conceded everything to which the comment related, we see no possibility of harm.* Cf. People v. Teale, 45 Cal. Rptr. 729, 740, 404 P.2d 209, 220 (Sup. Ct. 1965).

For these reasons we cannot find the comments during the trial or in the court's charge to the jury offended controlling federal doctrine. To this we add that the comments were in fact withdrawn in the supplemental instruction. Indeed, in withdrawing the comment the trial judge charged that the fact that defendant failed to take the stand shall not "enter into the discussions or deliberations of the jury in any manner." In thus instructing the jury that defendant's silence must be disregarded, the trial judge may have accorded defendant an instruction which the Federal Constitution does not require. That question was expressly reserved in Griffin v. California, supra, fn. 6, U.S. at , 14 L. ed 2d at 110:

> "We reserve decision on whether an accused can require, as in Bruno v. United

---

*Defendant does not attempt to demonstrate the comments of the prosecutor and the trial court were harmful when viewed in the context of the whole record. In fact, defendant presented so little of the record that no such evaluation, if it were critical, could be made. The State on the other hand urges an erroneous comment never warrants a reversal unless it can be found to have been harmful in the light of the total case. We referred to that question without deciding it, in *State v. Fioravanti, supra*, 46 N.J. at 121. Here, too, the question need not be met, because among the other things referred to above, the comment went no further than defendant's own admission in his summation and thus the possibility of harm was affirmatively dispelled.

States, 308 U.S. 287, 84 L. ed. 257, 60 S. Ct. 198, that the jury be instructed that his silence must be disregarded."

II.

Next defendant claims an immunity from prosecution under N.J.S.A. 49:3-16(d), a provision of the Uniform Securities Law. The Bureau of Securities conducted an investigation under the provision of the statute and ultimately succeeded in obtaining an injunction against this defendant. Conroy v. Schultz, 80 N.J. Super. 443 (Ch. Div. 1963).

Defendant's operations are described in the case just cited. He masterminded these swindles through the medium of corporations and a number of limited partnerships, he being, with one exception, the general partner and the individuals mulcted being sold what purported to be interests as limited partners. The corporate and partnership records were obtained by the Bureau of Securities by a subpoena addressed, not to the defendant, but to an individual who had custody of them and who was described in the record as the treasurer of the principal corporation involved.

Defendant seeks to claim immunity from prosecution under N.J.S.A. 49:3-16(d) which provides that a person must testify and must produce his records pursuant to subpoena but if he does so after claiming his privilege against self-incrimination he may not be prosecuted with respect to the

transaction to which such testimony or records relate.

Defendant was not subpoenaed to produce any record, and he produced none, but he claims the custodian of the corporate and partnership records produced some personal records in response to the subpoena upon the custodian. Defendant did not identify those records in his brief but after argument he referred us to nine of some 180 exhibits. The most we can find is that some of the exhibits produced by the custodian in response to the subpoena contained what appear to be individual entries concerning defendant, but for all we can tell, they may well have been part of the total records of the business operations because of the mode in which those operations were conducted. In any event, defendant makes no effort to show how any of those entries or records bears upon his conviction as to any count. Further, no claim of privilege was made to the Bureau when the records were handed over. In these circumstances there is no factual basis for a claim of immunity.

Defendant argues, as an incident to his basic claim of immunity, that the records were obtained by an illegal search and seizure. There was no search or seizure. There was a subpoena, and the representative of the corporation and limited partnerships complied with the subpoena without protest.

III.

The final point is that the sentence was mani-

festly excessive. We find no reason to question the trial court's judgment. State v. Brown, 46 N.J. 96 (1965).

The judgments are affirmed.

Appendix C

Judgment of Supreme Court of New Jersey Sought to be Reviewed

Appeal Docket No. 4863

This cause having been duly argued before this Court by Mr. Michael A. Querques, counsel for the appellant and Mr. Brendan T. Byrne, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court, Appellate Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court, Appellate Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 24th day of January, 1966.

s/ John H. Gildea
Clerk of the Supreme Court

Filed
Jan. 24, 1966.

s/ John H. Gildea
Clerk